Supreme Court, U. S.
FILED
OCT 21 1980
MICHAEL RODAK, JR., CLERK

Nos. 79-1404, 79-1408,
79-1414, 79-1415 and 79-1489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PENNHURST STATE SCHOOL AND HOSPITAL, ET AL.,
Petitioners

TERRI LEE HALDERMAN, ET AL.,
PENNSYLVANIA ASSOCIATION FOR RETARDED
CITIZENS, ET AL., and
UNITED STATES OF AMERICA,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE NATIONAL CENTER FOR LAW AND THE HANDICAPPED

STATE OF INDIANA PROTECTION AND ADVOCACY SERVICE COMMISSION FOR THE DEVELOPMENTALLY DISABLED

OHIO PROTECTION AND ADVOCACY ASSOCIATION AMICI CURIAE

RONALD M. SOSKIN
National Center for Law
and the Handicapped
P.O. Box 477
University of Notre Dame
Notre Dame, Indiana 46556
(219) 283-4536
Attorney for *Amici Curiae*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. NO REASONABLE RATIONALE CURRENTLY EXISTS TO SUPPORT THE SEGREGATION OF MENTALLY RETARDED PERSONS INTO ISOLATED AND HARMFUL INSTITUTIONS	4
A. Segregated Placements Into Institutions Cause Harm To Mentally Retarded Individuals	4
B. The Past Rationales In Support Of Institutionalization, Based Upon Segregation Of The Mentally Retarded From Society, Are Grossly Inaccurate And Without Merit	8
II. THE CURRENT RATIONALES IN SUPPORT OF SEGREGATION OF THE MENTALLY RETARDED ARE PREJUDICIAL AND INVALID BECAUSE THEY IGNORE THE SUBSTANTIAL DATA WHICH EXIST ON SUCCESSFUL HABILITATIONAL AND COMMUNITY PROGRAMS	13
A. Mental Retardation Is A Developmental Disability Necessitating The Provision Of Education And Training	14
B. Existing Data Illustrate The Fact That All Mentally Retarded Persons, Including Severely And Profoundly Retarded Persons, Are Capable Of Benefiting From Education	

TABLE OF CONTENTS—Continued

Page

And Training And That Habilitation Services Can Successfully Be Provided In Non-Segregated Community Settings 19

1. *Severely and Profoundly Mentally Retarded Persons Can Benefit From Education and Training Services* 19

2. *Recent Studies Illustrate That Virtually All Mentally Retarded Persons, Including Severely and Profoundly Retarded Persons, Can Successfully Reside in the Community With the Provision of Appropriate Services* 22

CONCLUSION 29

TABLE OF AUTHORITIES

Page

Cases

Brewster v. Dukakis, No. 76-4423-F (D. Mass., Dec. 6, 1978) 7

Brown v. Board of Education, 347 U.S. 483 (1954) .4, 15, 19

Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1974) and 461 F. Supp. 842 (N.D. Ohio 1978) 7

Evans v. Washington, 459 F. Supp. 483 (D.D.C. 1978) 7

Gary W. v. Louisiana, 437 F. Supp. 1209 (E.D. La. 1976) 7

Griswold v. Connecticut, 381 U.S. 479 (1965) 17

Halderman v. Pennhurst State School and Hospital, 446 F. Supp. 1295 (E.D. Pa. 1978), *aff'd in part and rev'd and remanded in part*, 612 F.2d 84 (1979), *cert. granted*, ___ U.S. ___, 100 S.Ct. 2984 (1980) 5, 14, 15, 28

Horacek v. Exon, 357 F. Supp. 71 (D. Neb. 1973) and No. 72-6-299 (D. Neb. 1975) 7, 24

Iasimone v. Garrahy, Civ. No. 77-0727 (D.R.I., April 6, 1979) 7

Meyer v. Nebraska, 262 U.S. 390 (1923) 17

Michigan Association for Retarded Citizens v. Smith, 475 F. Supp. 990 (E.D. Mich. 1979) 7

Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977) 17

New York State Association for Retarded Children v. Rockefeller (Carey), 357 F. Supp. 752 (E.D.N.Y. 1973) and 393 F. Supp. 715 (E.D.N.Y. 1975) 7

TABLE OF AUTHORITIES—Continued

	Page
O'Connor v. Donaldson, 422 U.S. 563 (1975)	14
Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971)	15
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	17
Roe v. Wade, 410 U.S. 113 (1973)	17
Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977)	17
Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part and vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977)	7
Wisconsin v. Yoder, 406 U.S. 205 (1972)	17
Wouri v. Zitnay, Civ. No. 75-80-SD (D. Me. July 14, 1978)	7
Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom., Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974)	7

Statutes and Legislative Materials

Developmentally Disabled Assistance and Bill of Rights Act	
42 U.S.C. §6000 et seq.	6, 30
42 U.S.C. §6001 (7)(A)(i)	14
Education for All Handicapped Children Act	
20 U.S.C. §1401 et seq.	30
Rehabilitation Act of 1973	
29 U.S.C. §701 et seq.	30
29 U.S.C. §793	30
29 U.S.C. §794	30

TABLE OF AUTHORITIES—Continued

Page

121 Cong. Rec. 9978 (April 10, 1975) 6

121 Cong. Rec. 16,516 (June 2, 1975) 7, 8

121 Cong. Rec. 16,522 (June 2, 1975) 6

H.R. Rep. 58, 94th Cong., 1st Sess. 10 6

H.R. Rep. 58, 94th Cong., 1st Sess. 15 6

S. Rep. No. 160, 94th Cong., 1st Sess. 26 6

Books and Articles

Adams, Mental Retardation and Its Social Dimensions (1971) 8, 10, 12

Altman, Cleland & Swartz, *Social Responsivity in the Profoundly Mentally Retarded*, 34 Perceptual and Motor Skills 101 (1972) 21

Barrett & McCormack, *Varied-Teacher Tutorials: A Tactic for Generating Credible Skills in Severely Retarded People*, Mental Retardation Vol. II, No. 6, at 14 (December 1973) 20

Bell, *IQ As A Factor in Community Life Style of Previously Institutionalized Retardates*, Mental Retardation, Vol. 14, No. 3, at 29 (1976) 24

Bellamy, Peterson & Close, *Habilitation of the Severely and Profoundly Retarded: Illustrations of Competence*, 10 Ed. and Training of the Mentally Retarded 1974 (1975) 21

Berkson & Landesman-Dwyer, *Behavioral Research on Severe and Profound Mental Retardation*, 81 Am. J. Ment. Defic. 428 (1977) 20

Bjaanes & Butler, *Environmental Variation in Community Care Facilities for Mentally Retarded Persons*, 78 Am. J. Ment. Defic. 429 (1974) 23

TABLE OF AUTHORITIES—Continued

Page

Blatt, Exodus From Pandemonium: Human Abuse and a Reformation of Public Policy (1970) 6

Blatt, Bogdan, Biklen & Taylor, *From Institution to Community: A Conversion Model*, in Educational Programming for the Severely and Profoundly Handicapped 40 (Sontag, ed. 1977) 16

Blatt and Kaplan, Christmas in Purgatory: A Photographic Essay on Mental Retardation (1966) 6

Booth, *Early Receptive Language Training for the Severely and Profoundly Retarded*, Language, Speech and Hearing Services in the Schools, Vol. 9, No. 3 (July 1978) 20

Bronston, *Matter of Design*, in Toward Excellence: Achievements in Residential Services for Persons with Disabilities 7 (Apolloni, Cappuccilli & Cooke, eds. 1980) 22

Bruininks, Hauber & Kudla, National Survey of Community Residential Facilities: A Profile of Facilities and Residents in 1977 (Developmental Disabilities Project on Residential Services and Community Adjustment 1979) 27, 28

Bullard, *State Care of High-Grade Imbecile Girls*, Proc. Nat. Conf. Charities & Corrections 299 (1910) 10

Burgdorf & Burgdorf, *The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 Temp. L.Q. 995 (1977). 11

Butterfield, *Institutionalization and Its Alternatives for Mentally Retarded People in the United States*, 6 Int. J. Ment. Health 21 (1977) 23

TABLE OF AUTHORITIES—Continued

Page

Centerwall & Centerwall, *A Study of Children With Mongolism Reared in the Home Compared to Those Reared Away from the Home*, 25 Pediatrics 678 (1960) 5

Chase, The Legacy of Malthus (1977)..... 11

Chinn, Drew & Logan, Mental Retardation: A Life Cycle Approach (2d ed. 1979) 18

Close, *Community Living for Severely and Profoundly Retarded Adults: A Group Home Study*, Educ. and Train. of the Ment. Retarded, Vol. 12, No. 3 (Oct. 1977)..... 24

Comptroller General of the United States, Report to the Congress, Returning the Mentally Disabled to the Community: Government Needs to Do More (1977) 8

Davies, Social Control of the Mentally Deficient (1930)..... 11, 12, 16

Devellis, *Learned Helplessness in Institutions*, Mental Retardation, Vol. 15, No. 5, at 10 (Oct. 1977)..... 5

Dybwad and Herr, *Unnecessary Coercion: An End to Involuntary Civil Commitment of Retarded Persons*, 31 Stan. L. Rev. 753 (1979)..... 6

Fabry & Reid, *Teaching Foster Grandparents to Train Severely Handicapped Persons*, 11 J.A.B.A. 111 (1978) 22

Fernald, *The Burden of Feeble-Mindedness*, 17 J. Psycho-Asthenics 97 (1912) 10

Fernald, *State Programs for the Care of the Mentally Defective*, 24 J. Psycho-Asthenics 114 (1919) 12

TABLE OF AUTHORITIES—Continued

Page

Francis, *The Effects of Own-home and Institution-rearing on the Behavioral Development of Normal and Mongol Children*, 12 J. Child Psych. & Psych. 173 (1971) 5

Galton, Hereditary Genius: An Inquiry Into Its Law and Consequences (1869) 11

Gladstone & Sherman, *Developing Generalized Behavior-Modification Skills in High-School Students Working With Retarded Children*, 8 J.A.B.A. 169 (1975) 22

Goddard, The Kallikak Family (1912) 10

Goffman, Asylums (1961) 6

Gold, *Task Analysis of a Complex Assembly Task by the Retarded Blind*, Exceptional Children, Vol. 43, No. 2, at 78 (October 1976) 21

Gollay, Freedman, Wyngaarden & Kurtz, Coming Back: The Community Experiences of Deinstitutionalized Mentally Retarded People (1978) 23

Grossman, Manual of Terminology and Classification in Mental Retardation (1973) 14

Guthrie, Butler & Gorlon, *Personality Differences Between Institutionalized and Non-Institutionalized Retardates*, 67 Am. J. Ment. Defic. 543 (1963) ... 5

Haskell, *Mental Deficiency Over a Hundred Years*, 100 Am. J. Psychiat. 107 (1944) 8

Heal, Sigelman & Switzky, *Research on Community Residential Alternatives for the Mentally Retarded*, in 9 International Review of Research in Mental Retardation 209 (Ellis, ed. 1978) 24

TABLE OF AUTHORITIES—Continued

Page

Herr, *Civil Rights, Uncivil Asylums and the Retarded*, 43 Cinn. L. Rev. 679 (1974) 6

Hooper & Wambold, *Improving the Independent Play of Severely Retarded Children*, Educ. and Train. of the Ment. Retarded, Vol. 13, No. 1 (Feb. 1978) 21

Howe, *Final Report of the Superintendent to the Trustees of the Massachusetts School for Idiotic Children* (1847), cited in President's Committee on Mental Retardation, Mental Retardation: Past and Present (Gray, ed. 1976)..... 9

Kanner, A History of the Care and Study of the Mentally Retarded (1964)..... 8

Kluger, Simple Justice (1976)..... 19

Knowlton, *The Pennsylvania System*, in Toward Excellence: Achievements in Residential Services for Persons with Disabilities 127 (Apolloni, Cappuccilli & Cooke, eds. 1980) 28, 29

Leland & Smith, Mental Retardation: Present and Future Prespectives (1974) 14, 18

Lippman & Goldberg, *Right to Education: Anatomy of the Pennsylvania Case and its Implications for Exceptional Children*..... 16

Lyle, *The Effect of an Institution Environment Upon the Verbal Development of Imbecile Children --Part I*, 3 J. Mental Deficiency Research 122 (1959) 5

Lyle, *The Effect of an Institution Environment Upon the Verbal Development of Imbecile Children-- Part II*, 4 *J. Mental Deficiency Research 1* (1960) 5

TABLE OF AUTHORITIES—Continued

Page

Lyle, *The Effect of an Institution Environment Upon the Verbal Development of Imbecile Children --Part III*, 4 J. Mental Deficiency Research 14 (1960) 5

Martin, Kehoe, Bird, Jensen & Darbyshire, *Operant Conditioning in Dressing Behavior of Severely Retarded Girls*, Mental Retardation, Vol. 9, No. 3, at 27 (June 1971) 20

Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 Creighton L. Rev. 124 (1976) 12, 14

McCarver & Craig, *Placement of the Retarded in the Community: Prognosis and Outcome*, 7 International Review of Research in Mental Retardation 145 (Ellis, ed. 1974) 23

Menolascino, Challenges in Mental Retardation (1977) 10

Miller and Miller, *The Handicapped Child's Civil Right As It Relates to the "Least Restrictive Environment" and Appropriate Mainstreaming*, 54 Ind. L. J. 1 (1978) 17

Mitchell & Smeriglio, *Growth in Social Competence in Institutionalized Mentally Retarded Children*, 74 Am. J. Ment. Defic. 666 (1970) 5

Murphy, Nuner & Hutchings-Ruprecht, *Reduction of Stereotyped Behavior in Profoundly Retarded Individuals*, 82 Am. J. Ment. Defic. 283 (1977) .. 20

National Center for Law and the Handicapped Monograph, Recent Developments in Right to Treatment and Deinstitutionalization Cases

TABLE OF AUTHORITIES—Continued

Page

(1979), reprinted in Amicus, Vol. 5, No. 2 (March-April 1980) 20

Nihira & Nihira, *Jeopardy in Community Placement*, 79 Am. J. Ment. Defic. 538 (1975) 23, 24

Nihira & Nihira, *Normalized Behavior in Community Placement*, Mental Retardation, Vol. 13, No. 2, at 9 (April 1975) 23, 24

Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 Harv. L. Rev. 1103 (1974) 17

O'Brien, Azrin & Boyle, *Training Profoundly Retarded Children to Stop Crawling*, 5 J.A.B.A. 131 (1972) 20

O'Neill & Bellamy, *Evaluation of a Procedure for Teaching Saw Chain Assembly to a Severely Retarded Woman, Mental Retardation, Vol. 16*, No. 1, at 37 (February 1978)..... 21

Osarchuk, *Operant Methods of Toilet-Behavior Training of the Severely and Profoundly Retarded: A Review*, 7 J. of Special Ed. 423 (1973)..... 20

Penrose, The Biology of Mental Defect (1966)..... 8, 11

Philips, Leibert & Poulos, *Employing Paraprofessional Teachers in a Group Language Training Program for Severely and Profoundly Retarded Children*, 36 Perceptual & Motor Skills 607 (1973) 22

Pickens, Eugenics and Progressives (1968) 11

Popenoe & Johnson, Applied Eugenics (1933)..... 11

TABLE OF AUTHORITIES—Continued

Page

President's Committee on Mental Retardation, Mental Retardation: Past and Present (Gray, ed. 1976) 8, 9

Provencal, *The Macomb-Oakland Regional Center*, in Toward Excellence: Achievement in Residential Services for Persons with Disabilities 19 (Apolloni, Cappuccilli & Cooke, eds. 1980) 27

Rapp & Deitz, *Reducing Aggressive and Self-Injurious Behaviors of Institutionalized Retarded Children Through Reinforcement of Other Behaviors*, 7 J.A.B.A. 313 (1974) 20

Regional Directors' Council, Nebraska Community-Based Mental Retardation Programs: Three Year Plan 1979-1982 (1980) 25, 26, 29

Retish, Hey & Boaz, *Systems Unlimited-Normalization Exemplified*, Mental Retardation, Vol. 16, No. 4 (Aug. 1978) 23

Rivera, Willowbrook: A Report on How It Is and Why It Doesn't Have to Be That Way (1972) 6

Robinson & Robinson, The Mentally Retarded Child 433 (2d ed. 1976) 10, 16, 18

Roos, *Basic Facts About Mental Retardation*, 1 Legal Rights of the Mentally Handicapped 17 (Ennis & Friedman, eds. 1973) 12

Rothman, *Reaction Comment*, in President's Committee on Mental Retardation, The Mentally Retarded Citizen and the Law 407 (Kindred, ed. 1976) 9

Sales & Frohboese, *Parental Opposition to Deinstitutionalization: A Challenge in Need of Attention*

TABLE OF AUTHORITIES—Continued

	Page
and Resolution, Law & Human Behavior, Vol. 4, Nos. 1-2 (1980)	25
Sarason & Doris, Psychological Problems in Mental Deficiency (1969)	11
Schlanger, *Environmental Influences on the Verbal Output of Mentally Retarded Children*, 19 J. Speech & Hearing Disorders 339 (1954)	5
Silverstein, *Changes in the Measured Intelligence of Institutionalized Retardates as a Function of Hospital Age*, 1 Development Psych. 125 (1969)	4
Sloan, *Four Score and Seven*, 68 Am. J. Ment. Defic. 6 (1963)	8
Sontag, Certo & Button, *On a Distinction Between the Education of the Severely and Profoundly Handicapped and a Doctrine of Limitations*, Exceptional Children, Vol. 45, No. 8, at 604 (May 1979)	24
Sontag, Dodd & Button, *The Education and Community Support of Severely Handicapped People*, 6 Int. J. Ment. Health 35 (1977)	22
Sternlich & Siegel, *Institutional Residence and Intellectual Functioning*, 12 J. Mental Deficiency Research 119 (1968)	4
Teitelbaum & Ellis, *The Liberty Interest of Children: Due Process Rights and Their Application*, 12 Fam. L. Q. 153 (1978)	4
Thrasher, *Right to Treatment Litigation*, in Shaping the Future: Community-Based Residential Services and Facilities for Mentally Retarded People 95 (Roos, McCann and Addison, eds. 1980)	7

TABLE OF AUTHORITIES—Continued

Page

Touche Ross & Co., State of Nebraska: Cost Study of the Community Based Mental Retardation Regions and the Beatrice State Developmental Center (August 15, 1980) 26, 27

Vogel, *Effects of Environmental Enrichment and Environmental Deprivation on Cognitive Functioning in Institutionalized Retardates*, 31 J. Consulting Psych. 570 (1967) 4

Wallin, Mental Deficiency (1956) 12

Weintraub and Abeson, *New Education Policies for the Handicapped: The Quiet Revolution*, in Public Policy and the Education of Exceptional Children 78 (Weintraub, Abeson, Ballard & Lavor, eds. 1976) 15

Whelan, *We've Only Just Begun*, in Educational Programming for the Severely and Profoundly Handicapped 469 (Sontag, ed. 1977) 16

Whitney, The Case for Sterilization (1934) 11

Williams & Hamre-Neitupski, *Teaching Selected Social Skills to Severely Handicapped Students*, SALT: School Applications of Learning Theory, Vol. 8, No. 3 (April 1976) 21

Wolfensberger, *The Origin and Nature of Our Institutional Models*, reprinted from President's Committee on Mental Retardation, Changing Patterns in Residential Services for the Mentally Retarded (Kugel & Wolfensberger, eds. 1969) 8, 9, 10, 13

Wolfensberger, The Principle of Normalization in Human Services (1972) 12

TABLE OF AUTHORITIES—Continued

Page

Wolfensberger, *Will There Always Be An Institution? II: The Impact of New Service Models*, in The History of Mental Retardation Vol. II, 415 (Rosen, Clark & Kurtz, eds. 1976) 17

INTEREST OF AMICI CURIAE

Amici curiae are organizations dedicated to ensuring the equal rights of handicapped persons through advocacy and educational services. All of these organizations have been involved in efforts to obtain appropriate and integrated community services for institutionalized mentally retarded and developmentally disabled individuals.

Through their combined expertise, *amici* have provided information, authorities and argument in an attempt to assist the Court in deciding the extremely important and complex issues presented in the case at Bar. *Amici* especially wish to assist the Court by placing the issues presented in their proper perspective and by describing the habilitational and community residential services data which provide a true picture of the nature and capabilities of mentally retarded persons.

The National Center for Law and the Handicapped is a research, advocacy and educational organization concerned with questions involving the legal rights of handicapped persons. The Center assists attorneys, organizations and individuals through direct participation in cases and through research and consultation. Assistance is often provided to courts by the filing of *amicus curiae* briefs; the Center has previously filed *amicus curiae* briefs in several cases involving handicapped persons before this Court.

The State of Indiana Protection and Advocacy Service Commission for the Developmentally Disabled and the Ohio Protection and Advocacy Association are state organizations established pursuant to the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6000 *et seq.* These agencies provide legal assistance and other forms of advocacy and protection to developmentally disabled individuals.

Amici's experiences in particular states and nationwide enable them to present to this Court extremely relevant information which *amici* believe will be of benefit to the Court and not otherwise presented by the parties. The parties have consented to the filing of this Brief.

SUMMARY OF ARGUMENT

The Court is presented with a case involving the segregation of mentally retarded individuals from the mainstream of society. *Amici* submit that, given the information and data presented herein and given the Congressional legislative actions based upon such data, the Federal Court of Appeals for the Third Circuit acted quite properly in requiring individualized placement determinations utilizing a presumption that the community is the most appropriate placement.

Congress had before it extensive information concerning the harms associated with institutionalization. The literature documents the developmental harms, and a multitude of federal court cases document the highly abusive conditions within institutions, resulting in gross physical harms. Institutions, *amici* assert, can in no conceivable manner be viewed as protective, pleasant or stimulating environments. Rather, the reality of institutionalization is incredibly bleak, and Congress was well aware of this as it deliberated on its appropriate legislative response.

Amici submit that it is extremely important for this Court to recognize the historical perspective in the treatment of mentally retarded persons in this society. Mentally retarded persons have consistently been viewed as "deviants," treated harshly throughout history. Highly prejudicial and erroneous conceptions of the nature of mental retardation served to further isolate them from society, either purportedly to protect them from society or to protect society from them. In an attempt to limit the

procreation of mentally retarded persons, which was viewed in the early twentieth century as a grave threat to society, isolated and massive institutions grew and expanded.

Not until the last few decades, long after those earlier prejudicial rationales for segregation were discredited, has society begun to rectify the past injustices and begin a process of reintegration of the mentally retarded into society. Based upon increased scientific knowledge and social science developments, illustrating the importance and the successes of education and training procedures, mentally retarded persons, no matter how severe their handicaps, have a reasonable expectation to achieve, like all other individuals, their maximum growth potential.

Amici in this brief counter the attempt by groups supporting appellants to portray severely and profundly retarded persons in hopeless and paternalistic terms. *Amici* urge this Court to recognize the potential of all persons, as Congress clearly has done, in emphasizing the significance of education in broad terms. *Amici* present some of the voluminous social science data which illustrates the achievements of severely and profoundly retarded persons, from the learning of simple tasks such as self-feeding to the acquiring of complex vocational tasks.

Finally, and most significantly, this brief presents data from functioning community service systems to dispel any notion that a label of severe or profound retardation prevents that individual from successfully residing in the community. The reality reflected by the studies and the success and quality of many existing community service systems reinforce the importance of the Congressional and Third Circuit approach of individualization. *Amici* submit that, given appropriate services to meet the needs of each individual, all mentally retarded persons can without question be served in and integrated into the community.

ARGUMENT

I. NO REASONABLE RATIONALE CURRENTLY EXISTS TO SUPPORT THE SEGREGATION OF MENTALLY RETARDED PERSONS INTO ISOLATED AND HARMFUL INSTITUTIONS.

A. Segregated Placements Into Institutions Cause Harm To Mentally Retarded Individuals.

The case at Bar is quite simply a case involving the segregation from society of a class of individuals who are labeled mentally retarded. This Court, similar to the circumstances in *Brown v. Board of Education*, 347 U.S. 483 (1954), involving segregation by race, is being asked by the appellants and their *amici curiae* to uphold the widespread use of institutional segregation, despite the documented harm suffered by the segregated individuals. The appellants, however, ask even more of the Court than was requested by those supporting segregation in *Brown*— the appellants ask the Court to overturn deliberate findings which were made by Congress based upon its evaluation of all available data.[1]

The harms of institutionalization have been illustrated in numerous ways. The literature is replete with evidence[2] that institutional residents, especially children, suffer decreases in such significant areas as intelligence quotient,[3] motor skills,[4] social competence,[5] and verbal

---

[1] Congressional intent and legislative history are discussed in great detail in the briefs of appellees and need not be repeated here.

[2] *See generally* Teitelbaum & Ellis, *The Liberty Interest of Children: Due Process Rights and Their Application*, 12 Fam. L.Q. 153 (1978).

[3] *See* Sternlich & Siegel, *Institutional Residence and Intellectual Functioning*, 12 J. Mental Deficiency Research 119 (1968); Silverstein, *Changes in the Measured Intelligence of Institutionalized Retardates as a Function of Hospital Age*, 1 Developmental Psych. 125 (1969); Vogel, *Effects of Environmental Enrichment and Environmental Deprivation on Cognitive Functioning in Institutionalized Retardates*, 31 J. Consulting Pysch. 570 (1967).

skills.[6] Mentally retarded persons face a significant risk that necessary skills will not be obtained while institutionalized or even that skills already acquired will be lost.[7] The record below indicates that a survey conducted at Pennhurst "revealed that 34% of the individuals in the group surveyed had some notation of regression in their records."[8]

Perhaps the greatest harm, however, is that which necessarily flows from segregation. While appellants' *amici* paint a picture of the institution as "paradise," with

---

[4] *See* Francis, *The Effects of Own-home and Institution-rearing on the Behavioral Development of Normal and Mongol Children*, 12 J. Child Psych. & Psych. 173 (1971) (less visual contact and fewer types of behavior among institutionalized children); Centerwall & Centerwall, *A Study of Children with Mongolism Reared in the Home Compared to Those Reared Away from the Home*, 25 Pediatrics 678 (1960).

[5] *See* Guthrie, Butler, & Gorlon, *Personality Differences Between Institutionalized and Non-Institutionalized Retardates*, 67 Am. J. Ment. Defic. 543 (1963) (negative self-attitude); Mitchell & Smeriglio, *Growth in Social Competence in Institutionalized Mentally Retarded Children*, 74 Am. J. Ment. Defic. 666 (1970) (deterioration in social competence unless special programming provided).

[6] *See* Schlanger, *Environmental Influences on the Verbal Output of Mentally Retarded Children*, 19 J. Speech & Hearing Disorders 339 (1954); Lyle, *The Effect of an Institution Environment Upon the Verbal Development of Imbecile Children--Part I*, 3 J. Mental Deficiency Research 122 (1959); Lyle, *The Effect of an Institution Environment Upon the Verbal Development of Imbecile Children--Part II*, 4 J. Mental Deficiency Research 1 (1960); Lyle, *The Effect of an Institution Environment Upon the Verbal Development of Imbecile Children--Part III*, 4 J. Mental Deficiency Research 14 (1960).

[7] One author terms the process "learned helplessness" where institutionalized residents become functionally incapacitated as a result of their prolonged confinement. DeVellis, *Learned Helplessness in Institutions*, Mental Retardation, Vol. 15, No. 5, at 10 (Oct. 1977).

[8] *Halderman v. Pennhurst State School and Hospital*, 446 F. Supp. 1295, 1308 n. 40 (E.D. Pa. 1977).

farms, gardens and playgrounds, the real existence behind institutional walls is one of hopelessness, helplessness and abuse.[9] No matter what rationales are employed to support the concept of segregation, the truth is that this segregation sets mentally retarded persons apart from their family, friends and community, reinforcing a prejudicial societal view of these individuals as "devalued" members of society.[10]

---

[9] *See* Blatt, Exodus From Pandemonium: Human Abuse and a Reformation of Public Policy 79-80 (1970). *See generally* Herr, *Civil Rights, Uncivil Asylums and the Retarded*, 43 Cinn. L. Rev. 679 (1974); Rivera, Willowbrook: A Report on How It Is and Why It Doesn't Have To Be That Way (1972); Blatt and Kaplan, Christmas in Purgatory: A Photographic Essay on Mental Retardation (1966); Goffman, Asylums (1961). As Congress recognized during the genesis of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6000 et seq. (hereinafter D.D. Act), "for the vast majority of individuals institutional care is inappropriate and inhumane." H.R. Rep. 58, 94th Cong., 1st Sess. 15, reprinted in [1975] U.S. Code Cong. & Admin. News 933.

[10] *See* Dybwad and Herr, *Unnecessary Coercion: An End to Involuntary Civil Commitment of Retarded Persons*, 31 Stan. L. Rev. 753, 756 (1979). Congress has come to the realization that the fact of institutionalization creates "myths and stereotypes" which "have isolated too many individuals with learning disabilities for too long." 121 Cong. Rec. 9978 (April 10, 1975) (remarks of Cong. Schroeder). *See also* remarks of Sen. Schweiker:

> Too often developmentally disabled persons are "put away" in an institution and forgotten. It is now time to provide alternatives to locking persons up in institutions.

121 Cong. Rec. 16,522 (June 2, 1975). The House and Senate reports consistently echo these findings.

> (T)he Committee is well aware that current theory with regard to the treatment and support of the developmentally disabled emphasizes that this treatment should be conducted in the individual's community without unnecessarily institutionalizing him....

H.R. Rep. 58, 94th Cong., 1st Sess. 10, reprinted in [1975] U.S. Code Cong. & Admin. News 919, 928. In S. Rep. No. 160, 94th Cong., 1st Sess. 26-34, entitled "Forces Behind Institutionalization and

The inevitable results of segregation are most strikingly illustrated by the findings made by courts in numerous institutional cases.[11] It is true that community living arrangements, still in relatively early stages of development, have been criticized in some instances as not appropriately meeting the needs of individuals. But these deficiencies do not compare with the stark horrors of life in institutions which remain after a century of operations.[12] The beatings, mistreatment and abuse have been extensively documented.[13] Unfortunately, these conditions

---

Deinstitutionalization," summarizing two years of Congressional hearings, the clear indication is that Congress in the D.D. Act desired to remedy "the rejection and exclusion from the mainstream of society" of retarded persons. *Id.* at 27.

[11] *See Michigan Association for Retarded Citizens v. Smith*, 475 F. Supp. 990 (E.D. Mich. 1979); *Iasimone v. Garrahy*, Civ. No. 77-0727 (D.R.I., April 6, 1979); *Brewster v. Dukakis*, No. 76-4423-F (D. Mass., Dec. 6, 1978); *Wuori v. Zitnay*, Civ. No. 75-80-5D (D. Me., July 14, 1978); *Evans v. Washington*, 459 F. Supp. 483 (D.D.C. 1978); *Gary W. v. Louisiana*, 437 F. Supp. 1209 (E.D. La. 1976); *Davis v. Watkins*, 384 F. Supp. 1196 (N.D. Ohio 1974) and 461 F. Supp. 842 (N.D. Ohio 1978); *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part, remanded in part*, 550 F.2d 1122 (8th Cir. 1977); *New York State Association for Retarded Children v. Rockefeller (Carey)*, 357 F. Supp. 752 (E.D.N.Y. 1973) and 393 F. Supp. 715 (E.D.N.Y. 1975); *Horacek v. Exon*, 357 F. Supp. 71 (D. Neb. 1973) and No. 72-6-299 (D. Neb. 1975); *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub. nom. Wyatt v. Aderholt*, 503 F. 2d 1305 (5th Cir. 1974).

[12] *See* 121 Cong. Rec. 16,516 (June 2, 1975) (remarks of Sen. Williams). Among the specific abuses of which Congress was aware are:

> inappropriate admissions because of lack of community services, inappropriate and inhumane experimentation with residents, sterilizations and other operations performed for convenience of treatment, starvation and malnutrition, abuse and physical punishment, inadequate food and living conditions, and death.

Id. at 16,517. In contrast, where community facilities have had time to fully develop, as discussed in Part II.B., *infra*, the situation is unquestionably far superior to institutional operations.

[13] Thrasher, *Right to Treatment Litigation*, in Shaping the Future: Community-Based Residential Services and Facilities for Mentally Retarded People 95, 104 (Roos, McCann & Addison, eds. 1980).

have been uncovered not just in a few isolated places such as Pennhurst but in virtually every case filed in court, covering scores of states.[14]

B. The Past Rationales In Support Of Institutionalization, Based Upon Segregation Of The Mentally Retarded From Society, Are Grossly Inaccurate And Without Merit.

Today there are over 150,000 residents of public institutions for the mentally retarded.[15] Historically, these large, isolated institutions developed not as a service to aid the mentally retarded but as part of a generalized pattern of segregating the "deviant."[16] History is replete with the harshness of the treatment of "deviant" mentally retarded persons.[17]

Though mental defect has long been distingushed from mental illness and insanity,[18] the history of segregated

---

[14] Congress has recognized that "such abuses are too commonplace to point at a single institution, or a single abuse, and say that it is an anomaly." 121 Cong. Rec. 16,516 (June 2, 1975) (remarks of Sen. Williams).

[15] Comptroller General of the United States, Report to the Congress, Returning the Mentally Disabled to the Community: Government Needs To Do More 9 (1977). The population peaked in 1967 at 193,200.

[16] Wolfensberger, *The Origin and Nature of Our Institutional Models*, reprinted from President's Committee on Mental Retardation, Changing Patterns in Residential Services for the Mentally Retarded (Kugel & Wolfensberger, eds. 1969). For historical trends in the institutionalization of mentally retarded persons, *see* President's Committee on Mental Retardation, Mental Retardation: Past and Present 3-23 (Gray, ed. 1976); Adams, Mental Retardation and Its Social Dimensions 16-51 (1971); Kanner, A History of the Care and Study of the Mentally Retarded (1964); Sloan, *Four Score and Seven*, 68 Am. J. Ment. Defic. 6 (1963); Haskell, *Mental Deficiency Over A Hundred Years*, 100 Am. J. Psychiat. 107 (1944).

[17] Penrose, The Biology of Mental Defect 2-3 (1966).

[18] *Id.* at 4.

confinement of mentally retarded persons is closely linked to the confinement of the insane and of the criminal.[19]

There was one historical thrust to move away from this model, yet it was rejected. Based upon an 1846 survey by Dr. Samuel Gridley Howe and his belief that mentally retarded persons could be improved in their functioning through education, Massachusetts established the first public residential institution.[20] Similar facilities, located in the hearts of communities, were established for "deviant" persons between 1850 and 1860[21] so that "expert and intensive attention could be concentrated on them."[22] Howe believed in the principle of "separation and diffusion" of the mentally retarded throughout society and, uncannily, recognized the dangers in the establishment of large, isolated, custodial institutions.

> Now the danger of misdirection . . . is, that two false principles may be incorporated with the projected institutions which will be as rotten piles in the foundations and make the future establishments deplorably defective and mischievous. These are: first, close congregation; and, second, the life-long association of a large number of idiots; whereas, the true, sound principles are: separation of idiots from each other; and then diffusion among the normal population . . . For these and other reasons it is unwise to organize establishments for teaching and training idiotic children, upon such principles as will make them become asylums for life.[23]

---

[19] Rothman, *Reaction Comment*, in President's Committee on Mental Retardation, The Mentally Retarded Citizen and the Law 407, 408 (Kindred, ed. 1976).

[20] Mental Retardation: Past and Present, *supra* note 16, at 3.

[21] *Id.* at 4.

[22] Wolfensberger, *supra* note 16, at 31.

[23] Howe, *Final Report of the Superintendent to the Trustees of the Massachusetts School for Idiotic Children* (1847), cited in Mental Retardation: Past and Present, *supra* note 16, at 5.

Unfortunately, this initial thrust, similar to educational boarding schools,[24] quickly faded as society solidified its view of the mentally retarded as deviants. Since mentally retarded persons were not quickly "cured" and returned to independent community life, society shifted to a belief that the only solution to this group's limitations was to protect them from society through a system of custodial care.[25]

Developments during the early decades of this century established the foundations for institutions as they exist today. Beyond regarding the mentally retarded as "deviants," the public began to treat mental retardation as a "social menace," and the emphasis shifted to the protection of society from them.[26]

Several factors contributed to this view. First, standardized tests of intelligence were developed; testing revealed that there were more mentally retarded persons in society than previously had been recognized.[27] Second, studies of family histories suggested that mental retardation might be hereditary.[28] Third, mental retardation came to be associated with juvenile delinquency, crime, and other social evils.[29] Fourth, it was believed that the rate of reproduction of retarded persons was greater than that of non-retarded persons.[30]

---

[24] Robinson & Robinson, The Mentally Retarded Child 433 (2d ed. 1976).

[25] Menolascino, Challenges in Mental Retardation 46-47 (1977).

[26] Wolfensberger, *supra* note 16, at 45.

[27] *Id.* at 46; Menolascino, *supra* note 25, at 48; Adams, *supra* note 16, at 30.

[28] Goddard, The Kallikak Family 117 (1912); Fernald, *The Burden of Feeble-Mindedness*, 17 J. Psycho-Asthenics 87 (1912); Adams, *supra* note 16, at 30-31.

[29] Wolfensberger, *supra* note 16, at 46; Adams, *supra* note 16, at 30. *See also* Bullard, *State Care of High-Grade Imbecile Girls*, Proc. Nat. Conf. Charities & Corrections 299 (1910).

[30] Wolfensberger, *supra* note 16, at 47; Menolascino, *supra* note 25, at 49.

The societal response was simple--something must be done to halt this spread of "defective persons." Obviously, the most extreme alternative was euthanasia.[31] Less drastic alternatives which would reduce the presence of mentally retarded persons in society were sterilization and institutionalization. The former was extensively employed in a misguided effort to prevent the further procreation of mental "defectives."[32] The latter, however, was an even better alternative, with the effect of segregating mentally retarded persons from society and from the possibility of procreation. Ringing with phrases such as "cutting off from the human population the supply of defectives," investigatory committees concluded that segregation was "the most practicable and acceptable means of control."[33]

While this eugenics movement also was aimed at blacks,[34] minority racial groups,[35] Mexicans and Indians,[36] and the foreign born (especially Southern Europeans)[37] and did affect the formulation of attitudes and policies,[38] the long-range effects fell most devastatingly on the mentally retarded. The most far-reaching harm

---

[31] While not utilized as a realistic alternative in the United States, euthanasia became widely utilized in Nazi Germany. *See* Penrose, *supra* note 17, at 2.

[32] *See* Chase, The Legacy of Malthus (1977). *See also* Burgdorf & Burgdorf, *The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 Temp. L.Q. 995 (1977).

[33] Davies, Social Control of the Mentally Deficient 121 (1930).

[34] Galton, Hereditary Genius: An Inquiry Into Its Law and Consequences 393-96 (1869).

[35] Pickens, Eugenics and Progressives 57 (1968).

[36] Popenoe & Johnson, Applied Eugenics 283 (1933).

[37] Whitney, The Case for Sterilization 147-49 (1934); Popenoe & Johnson, *supra* note 36, at 291; Pickens, *supra* note 35, at 65-67.

[38] Pickens, *supra* note 35, at 66. *See generally* Sarason & Doris, Psychological Problems in Mental Deficiency 310-11 (1969).

> lay in the philosophical rationale underlying the pattern of services and its acceptance by society as a whole. It contributed to the social devaluation of the retarded as human beings, and to their psychological and physical alienation from society, and singled them out on a fundamentally negative basis in a way that no other group has experienced since the quaranteening of lepers in the middle ages.[39]

Despite the harms of such a policy of segregation and the harms related to providing merely custodial care without education or training, the overriding purpose of institutionalization remained unquestioned.

> The objection may be urged that lifelong "confinement in an institution would suppress individuality and initiative [and] transform the inmates into unthinking mechanical automatons (robots)...[S]uch difficulties of adjustment when found would constitute a lesser evil than permitting mental deficients to enjoy unrestricted conjugal relations in society...In spite of its hampering limitations, at the present time segregation is probably the most feasible and the least objectionable means of checking the multiplication of dysgenic stocks.[40]

Long after these rationales for segregation had faded or had been discredited[41] and long after it was recognized that the goals of segregation could not be met,[42] institutions

---

[39] Adams, *supra* note 16, at 32.

[40] Wallin, Mental Deficiency 159 (1956).

[41] Fernald, *State Programs for the Care of the Mentally Defective*, 24 J. Psycho-Asthenics 114, 119-20 (1919). Current accepted attitudes toward mental retardation are expressed in the concepts of normalization, habilitation, and the developmental model. *See* Wolfensberger, The Principle of Normalization in Human Services (1972); Mason & Menolascino, *The Right to Treatment For Mentally Retarded Citizens: An Evolving Interface*, 10 Creighton L. Rev. 124 (1976); Roos, *Basic Facts About Mental Retardation*, 1 Legal Rights of the Mentally Handicapped 17 (Ennis & Friedman, eds. 1973).

[42] Davies, *supra* note 33, at 130.

continued to exist and to grow. Confinement of the mentally retarded had in the twentieth century become a well-established "social institution." Society was also unwilling to abandon its substantial investment in buildings and land, and society, further, had failed to provide community alternatives.[43] Not until the federal government began to legislate in this area and the federal courts began to scrutinize the faulty rationales behind the existence of these institutional settings did this old segregation model begin to fade.[44] However, new rationales have recently been developed, equally discriminatory, which threaten to undermine this growth away from unnecessary segregation (*See* Section II.B., *infra*).

II. THE CURRENT RATIONALES IN SUPPORT OF SEGREGATION OF THE MENTALLY RETARDED ARE PREJUDICIAL AND INVALID BECAUSE THEY IGNORE THE SUBSTANTIAL DATA WHICH EXIST ON SUCCESSFUL HABILITATIONAL AND COMMUNITY PROGRAMS.

Recently, the justification for segregating the mentally retarded from society has shifted back to a protective rationale, strikingly similar to that of an earlier era. This current protective rationale rests upon the assumptions that there are a class of mentally retarded persons, especially severely and profoundly retarded persons, who cannot benefit from habilitation and will never be able to live outside the "safe" institution. *Amici* submit that these assertions merely restate earlier prejudicial views of the mentally retarded. In the following sections, *amici* will place the issue in its proper perspective, and then discuss data which directly refute these rationales for segregation.

---

[43] Wolfensberger, *supra* note 16, at 77-78.

[44] The briefs of appellees support and discuss this point fully.

A. Mental Retardation Is A Developmental Disability Necessitating The Provision Of Education And Training.

The Court need not concern itself with "the baffling field of psychiatry,"[45] as this case concerns the habilitation of mentally retarded individuals.[46] The most widely used definition of mental retardation is that adopted by the American Association on Mental Deficiency:

> Mental retardation refers to significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested in the developmental period.[47]

Mentally retarded persons are not ill, needing treatment; rather, they are uneducated and untrained.[48] In fact, the major difference between a mentally retarded child and any other child is the mentally retarded child's inability to recognize cues and stimuli from his surroundings as appropriate guides to behavior.[49]

What is needed by the mentally retarded individual is a process of habilitation.

> [T]he overall thrust of modern habilitation is the remediation of the delayed learning process so as to develop the maximum growth potential by the acquisition of self-help, language, personal, social, educational, vocational, and recreational skills.[50]

---

[45] *O'Connor v. Donaldson*, 422 U.S. 575, 578 n. 2 (Burger, C.J., concurring).

[46] Mental retardation is included within the scope of the definition of developmental disabilities. D.D. Act, 42 U.S.C. §6001 (7)(A)(i); *Halderman v. Pennhurst State School & Hospital*, 612 F. 2d. 84, 95 (3rd Cir. 1979).

[47] Grossman, Manual of Terminology and Classification in Mental Retardation (1973).

[48] Leland & Smith, Mental Retardation: Present and Future Perspectives 80 (1974).

[49] *Id.* at 6.

[50] Mason & Menolascino, *supra* note 41, at 139-40.

The key to meeting the needs of the mentally retarded person is to improve his *learning* process.[51] In other words, *education*, in a sense broader than traditional schooling, is the critical service which society must provide.[52] Without educational services, the individual will be doomed to the limitations imposed by his/her own intellectual and functional deficiencies.

This Court long ago recognized the significance of education, including the harms resulting from segregating persons for the purpose of education.

> Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditure for education both demonstrate our recognition of the importance of education to our democratic society...In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education...Separate educational facilities are inherently unequal.

Brown v. Board of Education, 347 U.S. 483, 492 (1954). Data relied upon by the Court in *Brown* as well as data relied upon by the court in *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), guaranteeing mentally retarded children a similar right to education, reflect that education is viewed as a broad term. Education must be seen as a "continuous process by which individuals learn to cope and function within their environment,"[53] as part of a

---

[51] The Court of Appeals below recognized that there is broad potential for "remediation of the delayed learning process" in mentally retarded persons. 612 F.2d at 93.

[52] The district court below recognized, based upon the expert testimony it received, that "mental retardation is primarily an educational problem." 446 F. Supp. at 1298.

[53] Weintraub & Abeson, *New Education Policies For the Handicapped: The Quiet Revolution*, in Public Policy and the Education of Exceptional Children 78 (Weintraub, Abeson, Ballard & Lavor, eds. 1976).

much larger social context.[54] Furthermore, whether the process is called education or training is not relevant since the goal is the same--to improve the individual's functioning and capabilities.[55]

The importance of the education process for all mentally retarded persons cannot be overstated. It has repeatedly been shown that

> retarded children of any intelligence quotient are capable of benefiting from education... Education is even more important to the development of the retarded citizen than it is to normal citizens, for the latter may develop skills willy-nilly and informally, but the retarded citizen cannot, without sustained educational attention.[56]

This education process is, in fact, similar to the education process utilized for all individuals,[57] best exemplified by the widespread acceptance of the Montessori system of education.[58] This education approach developed from the conclusion that the problem of mental deficiency was essentially educational and not medical.[59]

---

[54] Blatt, Bogdan, Biklen & Taylor, *From Institution to Community: A Conversion Model*, in Educational Programming for the Severely and Profoundly Handicapped 40 (Sontag, ed. 1977).

[55] Whelan, *We've Only Just Begun*, in Educational Programming for the Severely and Profoundly Handicapped 469 (Sontag, ed. 1977).

[56] Lippman & Goldberg, Right to Education: Anatomy of the Pennsylvania Case and Its Implications for Exceptional Children (1973), cited in Robinson & Robinson, *supra* note 24, at 364. The practical experience of the Nebraska Community-based Mental Retardation programs confirms this. *See* note 108, *infra*, and accompanying text.

[57] Davies, *supra* note 33, at 43.

[58] *Id.*

[59] Robinson & Robinson, *supra* note 24, at 366. While the causes of mental retardation may, in some instances, be medical, the process of remediation is clearly educational and habilitational.

Furthermore, educators have stressed the potential harm associated with isolating handicapped children from a regular educational environment.

> Since the turn of the century, public schools have practiced segregating handicapped children into special classes for instruction...Now upon learning of the potentially dehumanizing effect of categorizing and segregating handicapped children in education, regular education is faced with the need for changes that will provide appropriate education in the mainsteam. Similarly, special education is faced with redefining its role of being a resource to these children in the mainstream without excessive characterization and "pull-out" programs.[60]

The family and home life and upbringing of an individual is also a key component of his/her educational process. The Court has repeatedly emphasized the value of family life in its recognition of the rearing of children as a fundamental right.[61] From an educational perspective, the family provides the basic socialization process. The prevalent socio-cultural attitudes and values in the United States rest upon keeping a child at home and maintaining the family.[62] *Amici* submit that even a clean and safe

---

[60] Miller & Miller, *The Handicapped Child's Civil Right As It Relates to the "Least Restrictive Environment" and Appropriate Mainstreaming*, 54 Ind. L.J. 1, 7 (1978); *See also* Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 Harv. L. Rev. 1103, 1119-20 (1974).

[61] *See e.g. Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977); *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

[62] Wolfensberger, *Will There Always Be an Institution? II: The Impact of New Service Models*, in The History Of Mental Retardation Vol. II, 415, 429 (Rosen, Clark & Kurtz, eds. 1976).

institution cannot provided needed socialization and human activities; rather, it necessarily provides a degenerative and depersonalizing environment.[63] As the authors of a basic textbook in mental retardation conclude:

> Institutionalization is contrary to the American value system...The family is viewed as a primary socializing agent, and the removal of a member of the family to an institution means that the individual will cease to function as a sociological member of the family.[64]

The school in this process ranks second only to the home in its impact on and development of essential societal skills.[65]

Statistics illustrate that most mentally retarded persons at the time of admission to an institution are still children and, in fact, the percentage of those being admitted who are children has been increasing.[66] In addition, the average age of the residents presently in institutions has been rapidly decreasing, so that by 1970 over half of the residents were under the age of 19.[67] *Amici* submit that this Court, as did the Court below, must focus upon the individual needs of each resident, which, it is apparent, rest heavily upon his or her learning and educational needs. Furthermore, the Court should recognize that appellees are not attempting to interfere in the intimate affairs of families; rather, the individualized approach advanced by appellees, and found by the court below to be appropriate, attempts to

---

[63] *See* Leland & Smith, *supra* note 48, at 82.

[64] Chinn, Drew & Logan, Mental Retardation: A Life Cycle Approach (2d ed. 1979).

[65] Robinson & Robinson, *supra* note 24, at 365.

[66] *Id.* at 435. In 1950, 79% of persons admitted to mental retardation institutions were under the age of 19 while by 1970 this percentage had risen to 87.5%.

[67] *Id.* While in 1950, only 32.7% of the resident population of institutions for the mentally retarded were under the age of 19, by 1970 this percentage had increased to 50.4%.

strengthen and maintain the traditional American belief in families by ensuring, where appropriate, the maintenance of community ties and family involvement.

B. Existing Data Illustrate The Fact That All Mentally Retarded Persons, Including Severely And Profoundly Retarded Persons, Are Capable Of Benefiting From Education And Training And That Habilitation Services Can Successfully Be Provided In Non-Segregated Community Settings.

1. *Severely and Profoundly Mentally Retarded Persons Can Benefit From Education and Training Services.* Despite the attempt in this case by some *amici* groups to portray severely and profoundly mentally retarded persons as incapable of benefiting from education and training services and incapable of residing in the community without grave danger, the expert data simply do not support this highly prejudicial and misconceived view. Rather, the arguments raised by these *amici* groups in support of the maintenance of segregation sound disturbingly similar to the kinds of arguments and warnings of pending harms and danger raised to oppose the desegregation of public schools mandated by this Court in *Brown v. Board of Education*, 347 U.S. 483 (1954).[68]

In the past two decades there has been a radical change in the view of professionals regarding the developmental potential of severely and profoundly retarded individuals.

> By the 1970's there was a large scientific literature documenting the behavioral potential of severely-profoundly retarded persons. A previous emphasis on diagnosis and classification has shifted to an experimental orientation. New methods for assessing and observing the behavior of previously "untestable" individuals were developed. The importance of the environment and of adequate stimulation was

---

[68] *See generally* Kluger, Simple Justice (1976).

> confirmed repeatedly, and basic principles of learning were used to increase self-help, social, academic, and vocational skills of severely-profoundly retarded persons.[69]

The effectiveness of the behavioral techniques which have been employed by professionals has been well documented.[70] There is extensive documentation of the increased independence of severely and profoundly retarded persons in the areas of self-help skills,[71] reduction of undesirable behaviors,[72] language skills,[73] social skills,[74]

---

[69] Berkson & Landesman-Dwyer, *Behavioral Research on Severe and Profound Mental Retardation*, 81 Am. J. Ment. Defic. 428 (1977).

[70] *Id.* at 432. For an exhaustive documentation of studies supporting the data presented herein, *see* NCLH monograph, Recent Developments in Right to Treatment and Deinstitutionalization Cases (1979), reprinted in Amicus, Vol. 5, No. 2 (March-April 1980).

[71] *See e.g.* O'Brien, Agrin & Boyle, *Training Profoundly Retarded Children to Stop Crawling*, 5 J.A.B.A. 131 (1972) (walking); Osarchuk, *Operant Methods of Toilet Training of Severely and Profoundly Retarded: A Review*, 7 J. of Spec. Ed. 423 (1973) (proper toileting); Martin, Kehoe, Bird, Jensen & Darbyshire, *Operant Conditioning in Dressing Behavior of Severely Retarded Girls*, Mental Retardation, Vol. 9, No. 3, at 27 (June 1971) (dressing themselves). Other self-help skills documented include self-feeding, standing without support, brushing teeth, and self-medication.

[72] *See e.g.* Murphy, Nuner & Hutchings-Ruprecht, *Reduction of Stereotyped Behavior in Profoundly Retarded Individuals*, 82 Am. J. Ment. Defic. 238 (1977) (reducing stereotyped behaviors); Rapp & Deitz, *Reducing Aggressive and Self-Injurious Behaviors of Institutionalized Retarded Children Through Reinforcement of Other Behaviors*, 7 J.A.B.A. 313 (1974) (reducing antisocial and self-abusive behaviors).

[73] *See e.g.* Booth, *Early Receptive Language Training for the Severely and Profoundly Retarded*, Language, Speech, and Hearing Services in the Schools, Vol. 9, No. 3, at 151 (July 1978) (general language skills); Barrett & McCormack, *Varied-Teaching Tutorials: A Tactic for Generating Credible Skills in Severely Retarded People*, Mental Retardation, Vol. II, No. 6, at 14 (Dec. 1973) (primitive reading skills). Other language skills include learning picture names, asking

and vocational skills.[75] The important factor in achieving these successful results is the *program* employed.

> A number of the traditional assumptions underlying instructional programs for severely handicapped children have been challenged by those who believe that acquisition of skills may be more a function of instructional programming than a question of limited mental ability...A crucial difference in the teaching procedures utilized with the severely handicapped, as differentiated from the normal or the mildly handicapped, is the degree of precision required in instructional programming...As a result, the disciplined precision required by a task-analysis approach to instructional programming has been

---

questions, developing snytax, responding to greetings, and following instructions.

[74] Williams & Hamre-Nietupski, *Teaching Selected Social Skills to Severely Handicapped Students*, SALT: School Applications of Learning Theory, Vol. 8, No. 3, at 1 (April 1976) (eliciting social responses); Altman, Cleland & Swartz, *Social Responsibility in the Profoundly Mentally Retarded*, 34 Perceptual and Motor Skills 101 (1972) (acquisition of hand-shake greetings); Hooper & Wambold, *Improving the Independent Play of Severely Retarded Children*, Educ. and Train. of the Ment. Retarded, Vol. 13, No. 1, at 42 (Feb. 1978) (cooperative play). Other social skills include child-initiated face-to-face orientation with others and child-initiated non-aggressive physical contact involving the hands with others.

[75] *See e.g.* Bellamy, Peterson & Close, *Habilitation of the Severely and Profoundly Retarded: Illustrations of Competence*, 10 Ed. and Training of the Mentally Retarded 1974 (1975) (general vocational tasks); Gold, *Task Analysis of a Complex Assembly Task by the Retarded Blind*, Exceptional Children, Vol. 43, No. 2, at 78 (Oct. 1976) (complex vocational tasks); O'Neill & Bellamy, *Evaluation of a Procedure for Teaching Saw Chain Assembly to a Severely Retarded Woman*, Mental Retardation, Vol. 16, No. 1, at 37 (Feb. 1978) (concluding that even severe retardation does not restrict an individual's potential to learn a variety of work behaviors and that the training procedure is the key not the degree of retardation.

relied upon in an increasing number of successful educational programs for the severely handicapped.[76]

Furthermore, these programs can be successfully carried out in various environments and by professionals or non-professionals.[77] Thus, educational and training programs for severely and profoundly mentally retarded persons have been shown not only to be successful but also to be feasible in a variety of settings provided that *appropriate* programming techniques are utilized.[78]

2. *Recent Studies Illustrate That Virtually All Mentally Retarded Persons, Including Severely and Profoundly Retarded Persons, Can Successfully Reside in the Community with the Provision of Appropriate Services.* *Amici* groups in support of appellants also have attempted to convince this Court that most severely and profoundly retarded individuals will never be able to reside in the community, by discussing the problems of specific instances of inappropriate community living arrangements and then generalizing these deficiencies to apply to the situations of all individuals labeled as severely or profoundly retarded. However, they fail to understand their own basic point; it is the inadequacy of the services in those residences that is to blame, not the inadequacy of the

---

[76] Sontag, Dodd & Button, *The Education and Community Support of Severely Handicapped People*, 6 Int. J. Ment. Health 35, 36 (1977). In this sense, program means the individual habilitation program.

[77] *See* Gladstone & Sherman, *Developing Generalized Behavior-Modification Skills in High-School Students Working With Retarded Children*, 8 J.A.B.A. 169 (1975); Phillips, Leibert & Poulos, *Exploring Paraprofessional Teachers in a Group Language Training Program for Severely and Profoundly Retarded Children*, 36 Perceptual and Motor Skills 607 (1973); Fabry & Reid, *Teaching Foster Grandparents to Train Severely Handicapped Persons*, 11 J.A.B.A. 111 (1978).

[78] *See* Bronston, *Matter of Design*, in Toward Excellence: Achievements in Residential Services for Persons with Disabilities 7, 14 (Apolloni, Cappuccilli & Cooke, eds. 1980), emphasizing program and not the dwelling as the key to successful community placement.

mentally retarded residents. The data illustrate clearly that no single variable is a reliable predictor of successful community adjustment.[79] The majority of studies have found no meaningful relationships between I.Q. and successful community placement.[80]

The important factor is what the Third Circuit below relied upon in interpreting Congressional intent--the special, individualized needs of each mentally retarded person. There is no question but that there are important differences in quality of care given by different community facilities.[81] Where appropriate care is provided and appropriate placement occurs, risks are minimized.[82]

Numerous studies illustrate the diversity of activities available to profoundly and severely retarded persons living in appropriate community settings, the successful adaption to community placement, and the level of satisfaction evidenced by both the former institutional residents and their new "families."[83] A recent comprehensive

---

[79] McCarver & Craig, *Placement of the Retarded in the Community: Prognosis and Outcome*, in 7 Int. Review of Research in Mental Retardation 145, 168-78 (Ellis, ed. 1974).

[80] *Id.* at 170-72. Again this fact is clearly supported by the reality of existing successful community service systems. *See e.g.* note 108, *infra*, and accompanying text for the experience in Nebraska.

[81] Butterfield, *Institutionalization and Its Alternatives for Mentally Retarded People in the United States*, 6 Int. J. Ment. Health 21 (1977); Bjaanes & Butler, *Environmental Variation in Community Care Facilities for Mentally Retarded Persons*, 78 Am. J. Ment. Defic. 429 (1974).

[82] Nihira & Nihira, *Jeopardy in Community Placement*, 79 Am. J. Ment. Defic. 538 (1975); Nihira & Nihira, *Normalized Behavior in Community Placement*, Mental Retardation, Vol. 13, No. 2, at 9 (April 1975); Retish, Hey & Boaz, *Systems Unlimited-Normalization Exemplified*, Mental Retardation, Vol. 16, No. 4, at 313 (Aug. 1978).

[83] Gollay, Friedman, Wyngaarden & Kurtz, *Coming Back: The Community Experiences of Deinstitutionalized Mentally Retarded People* (1978) (contrary to the assertions in the brief of *amici*,

review of studies has led, once again, to the conclusion that level of retardation cannot be simply and directly correlated with successful community placement.

> [S]ome recent data support the assertion that there are cost-efficient, community based, culturally normative alternatives..., that large numbers of individuals have been placed in them over the past 10 years. Success of placement was seen to depend primarily on the quality of the community support system rather than on characteristics of individuals themselves... There appears to be very little empirical support for restricting placement on the basis of age or IQ, except that demands for community service and environmental supports appear to correlate with these variables.[84]

Heavily represented among *amici* groups in support of appellants are Nebraska parties.[85] These groups all continue to support the segregation of mentally retarded persons in institutions, especially severely retarded persons. Yet an examination of data from Nebraska provides a strikingly different picture from that presented by these *amici* groups.

Congress of Advocates for the Retarded, approximately 25% of the study group consisted of severely or profoundly retarded individuals); Nihira & Nihira, *supra* note 82; Close, *Community Living for Severely and Profoundly Retarded Adults: A Group Home Study*, Educ. and Train. of the Ment. Retarded, Vol. 12, No. 3, at 256 (Oct. 1977). *See generally* Sontag, Certo & Button, *On a Distinction Between the Education of the Severely and Profoundly Handicapped and a Doctrine of Limitations*, Exceptional Children, Vol. 45, No. 8, at 604 (May 1979).

[84] Heal, Sigelman & Switsky, *Research on Community Residential Alternatives for the Mentally Retarded*, in 9 Int. Review of Research in Mental Retardation 209, 243 (Ellis, ed. 1978). *See also* Bell, *IQ As A Factor in Community Life Style of Previously Institutionalized Retardates*, Mental Retardation, Vol. 14, No. 3, at 29 (1976).

[85] The Beatrice State Developmental Center has been the focus of litigation and implementation of a consent decree entered into in 1975. *Horacek v. Exon*, 357 F. Supp. 71 (D. Neb. 1973) and No. 72-6-299 (D. Neb. 1975).

Over twenty-five percent of all mentally retarded persons being served in Nebraska Community-based Mental Retardation programs (CBMRs) are severely and profoundly retarded.[86] Despite the assertion that many residents of Pennhurst cannot be served due to their mobility problems, the Nebraska CBMRs serve 139 (5%) clients who are non-ambulatory (not mobile without assistance or without prosthetic devices) and 163 (6%) clients who are mobile/non-ambulatory (able to move without assistance only if a barrier-free environment exists).[87] Furthermore, the CBMRs serve 355 clients with behavior disorders serious enough to require special intervention and intensive behavioral programming.[88]

The stability of these community settings has been firmly established, and the continuity of this system of community programs remains unquestioned.[89] Under scrutiny by accreditation agencies as to the quality of the programs, the community settings have fared much better than the institutional setting.[90] Their success rate is evidenced by

---

[86] Regional Directors' Council, Nebraska Community-based Mental Retardation Programs: Three Year Plan 1979-1982 at 125 (1980) (508 severe and profound and 1446 mild and moderate).

[87] *Id.* at 127-128.

[88] *Id.* at 130.

[89] *Id.* at 21-24. The state does not operate the CBMRs, rather the 6 regional programs are under the operational control of local subdivisions of government and have functioned since the 1972-73 fiscal year. The CBMRs do, however, receive substantial state funding and are subject to state standards.

[90] *See* Sales & Frohboese, *Parental Opposition to Deinstitutionalization: A Challenge in Need of Attention and Resolution*, Law and Human Behavior, Vol. 4, Nos. 1-2 (1980) [adapted from an unpublished dissertation at University of Nebraska-Lincoln at 112 (Dec. 1979)], noting that Beatrice State Developmental Center is not accredited while five of the six CBMRs have been accredited by the Joint Commission on Accreditation of Hospitals.

the fact that from fiscal year 1968-69 through 1972-73, when the CBMRs were created, 25% of placements out of the institution were into the community while 40% were into nursing homes; since 1972-73, 74.4% of placements have been into the community while only 7.2% have been into nursing homes.[91] Since 1972-73, while 479 individuals have been placed from the institution into the community, only 35 have been returned.[92]

The distorted picture of mentally retarded residents of Pennhurst and other institutions, presented by the *amici* brief of the Congress of Advocates For the Retarded, is one of non-functioning, medically dependent individuals, who could not survive but for the protective institutional environment. In a study commissioned by the Nebraska Department of Public Welfare and Department of Public Institutions, Touche Ross & Co. reported that

> of the approximately 335 BSDC (Beatrice State Development Center) clients identified with special medical needs, in the *opinion of the BSDC medical staff* only 8 require intense medical services not typically provided in the CBMR residential programs.[93]

Furthermore, Touche Ross & Co. found that the remaining 327 clients with special medical needs could be appropriately served in CBMR programs with special support.[94] In addition, Touche Ross & Co. found that the

---

[91] Three Year Plan, *supra* note 86, at 23.

[92] *Id.* This total of 35 represents a duplicated count, meaning that each time a single individual returns to an institution, he/she is again counted as a readmission. Thus, the actual number of individuals who have returned to the institution could be much less.

[93] Touche Ross & Co., State of Nebraska: Cost Study of the Community Based Mental Retardation Regions and the Beatrice State Developmental Center 41 (August 15, 1980) (emphasis added).

[94] *See id.* at 85-86 (Schedule 30), for a detailed description of the medical conditions and how the CBMRs would service those needs.

CBMRs were already serving numerous clients with high or moderate needs and that to provide a full range of services would cost the same or significantly less than the cost of services in the institution.[95]

Serving severely and profoundly retarded individuals in the community is not unique to Nebraska and certainly is not the "impossibility" suggested by the *amici* groups supporting appellants. In the Macomb-Oakland Regional Center program in Michigan, for example, which is a component of the state system of mental retardation services, sixty percent (60%) of persons served in group homes and community training homes have severe to profound mental retardation.[96] Of these individuals, seventy percent (70%) have serious secondary handicaps,[97] and many are considered medically fragile.[98]

A national survey found that as of June 30, 1977, thirty-two percent (32%) of all residents of community facilities were severely and profoundly retarded,[99] more than half had at least one additional handicap,[100] and twenty-three and one-half percent (23.5%) of those in community facilities of ten or less residents were severely and profoundly retarded.[101] Eighty-two percent of these residents exhibited at least one limitation in functional daily living skills.[102] Furthermore, nineteen percent were

---

[95] *See id.* at 23-27.

[96] Provencal, *The Macomb-Oakland Regional Center*, in Toward Excellence: Achievements in Residential Services for Persons with Disabilities 19, 25 (Apolloni, Cappuccilli & Cooke, eds. 1980).

[97] *Id.*

[98] *Id.* at 40.

[99] Bruininks, Hauber & Kudla, National Survey of Community Residential Facilities: A Profile of Facilities and Residents in 1977 at 75 (Developmental Disabilities Project on Residential Services and Community Adjustment 1979).

[100] *Id.* at 79.

[101] *Id.* at 82.

[102] *Id.* at 83-84.

multiply handicapped with two or more handicaps in addition to retardation.[103] Finally, over fifty percent of the community facilities reported no movement into or out of the facility during the twelve month period covered by the survey, illustrating a level of stability.[104] This reality contrasts with the generalizations asserted by the *amici* brief of the Congress of Advocates for the Retarded, which, rather than focusing on individual needs and programs, draws conclusions on the basis of labels.

The *amici* brief filed by Congress of Advocates for the Retarded, et al., also claims that no parties at trial raised opposition to community care for all mentally retarded persons. The reason, very simply, is that Pennsylvania recognized that the argument against the viability of community services is spurious. As acknowledged by the Director for the Bureau of Community Programs, Office of Mental Retardation, Commonwealth of Pennsylvania, the community living arrangement program, which would serve the class of persons in the case at Bar, is "structured to meet the needs of all mentally retarded individuals, no matter what the age or severity of handicap."[105] The Superintendent of Pennhurst and the regional administrators have repeatedly admitted that all residents of Pennhurst--all retarded individuals--can reside in community living arrangement programs.[106] Even those

---

[103] *Id.* at 83.

[104] *Id.* at 91.

[105] Knowlton, *The Pennsylvania System*, in Toward Excellence: Achievements in Residential Services for Persons with Disabilities 127, 132 (Apolloni, Cappuccilli & Cooke, eds. 1980).

[106] The Third Circuit, 612 F.2d at 93 (1979), and the District Court, 446 F. Supp. at 1312-1313 (1977), recognized this. The record is replete with acknowledgements by state officials that *Pennhurst* should be closed and that all residents could be served in the community. *See* Youngberg deposition at 102, Foster deposition at 63, and Rice deposition at 180-81. In the transcript, *see* 22-171 to 172 (Youngberg), 22-77 (Foster) and 26-22 (Rice). The state experts at trial also agreed. *See* transcript at 14-73 (Thurman) and 14-21 (Walker).

who are medically fragile are now beginning to be served in small homes, apartments, and single-client placement sites.[107]

This data, *amici* submit, illustrate that there exists no empirical support for institutions or for segregation. Rather, these segregation policies are an extension of misguided prejudices. As the Nebraska CBMR plan verifies:

> Experience has shown that...services can be provided within community-based mental retardation programs for all of the individuals being discussed... The regions (CBMRs) are currently serving people in all IQ categories and with all levels of handicapping conditions. This demonstrates a capacity on the part of the regions to serve the entire range of mental retardation. Therefore, the ability to serve those "multiply" handicapped individuals is not the exclusive providence of the institution.[108]

CONCLUSION

The Court has before it a case involving the segregation of mentally retarded persons. But the Court need not consider this issue in a vacuum. Rather, Congress has carefully scrutinized this issue and all relevant data and has passed legislation which makes it unmistakenly clear that integration of the mentally retarded into society is the operable goal.

Over a period of years, Congress repeatedly had before it for consideration the data discussed herein. In addition, it had the findings of numerous lower courts which exposed the horrors of segregated life and upheld the rights of mentally retarded individuals to equal treatment in all aspects of society.

---

[107] Knowlton, *supra* note 105, at 133, 137.

[108] Three Year Plan, *supra* note 86, at 112.

By enacting the Rehabilitation Act of 1973, 29 U.S.C. §701 et seq., Congress acted to prohibit discrimination of the handicapped generally, both by recipients of federal financial assistance, 29 U.S.C. §794, and by federal contractors of $2500 or more, 29 U.S.C. §793. In 1975, Congress passed the Education for All Handicapped Children Act, 20 U.S.C. §1401 et seq., to prohibit segregated education and to guarantee all handicapped children a right to a free, appropriate public education in an integrated environment. In 1975, the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. 6000 et seq., was passed by Congress, continuing and expanding its attempt to provide needed services to handicapped persons while ending their unnecessary segregation from society.

Rather than awaiting definitive action by this Court to rectify injustices, as it had in the racial segregation issue, Congress acted to ensure on an individualized basis that every person, whether called handicapped, developmentally disabled or mentally retarded, be free from the unwarranted exclusion from society. The Third Circuit below did nothing more than apply this concept of individualized determination in establishing a process by which mentally retarded persons could finally, as Congress intended, be returned to community life.

For the reasons discussed in this brief, *amici* respectfully request this Court to affirm the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Ronald M. Soskin
Counsel for Amici Curiae
National Center for Law
and the Handicapped
Notre Dame, Indiana 46556
(219) 283-4536

On the Brief:
Kevin Lilly
Legal Intern